include the power to order equitable disgorgement. Pet. App. 13a-23a. In an opinion written by Judge Sentelle, the majority declared that "[t]his language indicates that the jurisdiction is limited to forward-looking remedies that are aimed at future violations," whereas disgorgement, in the majority's view, "is a quintessentially backward-looking remedy focused on remedying the effects of past conduct to restore the status quo." *Id.* at 15a-16a. The majority further noted that RICO's criminal forfeiture provision, 18 U.S.C. 1963(a), and the private right of action for treble damages, 18 U.S.C. 1964(c), provide remedies for past conduct, and it concluded that "[t]his 'comprehensive and reticulated' scheme, along with the plain meaning of the words themselves, serves to raise a 'necessary and inescapable inference' * * * that Congress intended to limit relief under § 1964(a) to forward-looking orders, ruling out disgorgement." Pet. App. 20a (citation omitted).[2]

Judge Tatel stated in his dissenting opinion that the court should dismiss the interlocutory appeal to "preserv[e] section 1292(b)'s integrity and discourag[e] the kind of litigating tactics reflected in this record." Pet. App. 49a. But because the majority addressed the merits, he did so as well. *Id.* at 49a-78a. Judge Tatel concluded that the majority's narrow reading of Congress's grant of power to "prevent and restrain" RICO violations is inconsistent with this Court's decisions in

---

[2] Judge Williams joined in Judge Sentelle's opinion, but wrote separately to emphasize his disagreement with the Second Circuit's conclusion in *Carson* that disgorgement should be available when unlawfully obtained profits are "being used to fund or promote the illegal conduct, or [that] constitute capital available for that purpose." Pet. App. 23a (quoting *Carson*, 52 F.3d at 1182); see *id.* at 23a-25a.

Porter v. *Warner Holding Co.*, 328 U.S. 395 (1946), and *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), which established that a grant of equitable jurisdiction encompasses the full range of traditional equitable remedies unless the statute by its terms or by necessary inference restricts the court's jurisdiction in equity. Pet. App. 51a-65a. He rejected the proposition that disgorgement is, by its nature, "backward-looking," *id.* at 67a-68a, and urged that the district court should be allowed to decide in the first instance "what remedy or combination of remedies" would "serve to prevent and restrain" defendants from committing future RICO violations, *id.* at 73a.

The court of appeals denied the government's petition for rehearing en banc by a 3-3 vote, with 3 judges not participating. Pet. App. 156a-157a.[3]

REASONS FOR GRANTING THE PETITION

The court of appeals' decision in this case holds that a district court's equitable authority to "prevent and restrain" violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1964(a), excludes, as a matter of law, the remedial authority to order disgorgement of illegally obtained proceeds. There are compelling reasons for this Court to review that decision.

First, the divided court of appeals' erroneous construction of RICO's remedial provisions has fractured widely accepted understandings respecting a district court's equitable jurisdiction. That decision: (a) rejects this Court's teachings in *Porter* v. *Warner Holding Co.*,

---

[3] The district court has not stayed the trial proceedings during the interlocutory appeal. The court has heard testimony and received other evidence, heard closing arguments, and scheduled post-trial briefing. See note 7, *infra*.

328 U.S. 395 (1946), and *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960); and (b) presents a direct and self-acknowledged conflict with the decisions of two other courts of appeals on the precise issue presented, see *Richard* v. *Hoechst Celanese Chem. Group, Inc.*, 355 F.3d 345, 354-355 (5th Cir. 2003), cert. denied, 125 S. Ct. 46 (2004); *United States* v. *Carson*, 52 F.3d 1173, 1181 (2d Cir. 1995), cert. denied, 516 U.S. 1122 (1996). Those conflicts, by themselves, warrant this Court's review.

Second, the divided panel has incorrectly decided an issue of surpassing importance in an exceptionally important case. Congress enacted RICO to create new tools to combat structured illicit activities and gave the government the full panoply of equitable remedies needed to achieve that goal. See *United States* v. *Turkette*, 452 U.S. 576, 585 (1981). The government invoked those powers in this case to address ongoing concerted unlawful activity in the tobacco industry spanning decades and affecting the lives of millions of Americans. The government's suit, by any measure, is the most important civil RICO action that the government has ever brought. The government's ability to achieve justice in this case depends on the availability of the full scope of equitable remedies that Congress conferred. The government cannot protect the public interest if it cannot "divest the [RICO enterprise] of the fruits of its ill-gotten gains." *Ibid.*

Third, while the interlocutory character of a court of appeals' decision normally counsels against this Court's immediate review, in this case it heightens the need for the Court's intervention. This case was in the court of appeals pursuant to 28 U.S.C. 1292(b), which Congress enacted specifically to provide for appellate review of controlling questions of law while a case is still pending

in the district court. This Court has granted certiorari in a number of cases that reached the court of appeals through that special mechanism, where the issue decided by the court of appeals otherwise warrants review. Here, moreover, the district court certified its order for interlocutory appeal under 28 U.S.C. 1292(b) because it discerned the need for interlocutory guidance on a relatively narrow remedial issue. At respondents' urging, however, the panel majority went much further and entered an erroneous categorical ruling that will impede, rather than advance, the ultimate resolution of this case. The Court's intervention at this juncture will not only resolve the conflict with decisions of this Court and other courts of appeals, but also will reinvest the district court with the authority it needs for the expeditious and correct resolution of this litigation.

I. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THE DECISIONS OF THIS COURT AND DECISIONS OF OTHER COURTS OF APPEALS

A. The Court Of Appeals' Decision Conflicts With The Principles Established By This Court's Decisions In *Porter* and *Mitchell*

This Court's decisions provide a specific analytical framework for determining the scope of equitable jurisdiction of the type conferred by Section 1964. As the Court observed in *Turkette*, Congress enacted RICO to provide "new remedies to deal with the unlawful activities of those engaged in organized crime." 452 U.S. at 589 (quoting Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 923). Section 1964(a) correspondingly vests the courts with broad equitable jurisdiction to "prevent and restrain" RICO violations

through "appropriate orders." 18 U.S.C. 1964(a).[4] As the Court explained in *Porter* and *Mitchell*, statutory provisions of this character authorize the district courts to employ the full range of equitable powers, including an order of disgorgement, so that those courts can fashion appropriate relief. See *Mitchell*, 361 U.S. at 290-293; *Porter*, 328 U.S. at 397-398.

1. When Congress enacted RICO in 1970, it was legislating against the backdrop of this Court's 1946 *Porter* decision and its 1960 *Mitchell* decision. This Court may properly presume that Congress was aware of the Court's well known, firmly established, and directly relevant decisions. See, *e.g.*, *United States* v. *Alaska*, 521 U.S. 1, 35 (1997); *Cannon* v. *University of Chicago*, 441 U.S. 677, 699 (1979). The decisions in *Porter* and *Mitchell* established that a legislative grant of general equitable authority, such as the power to "enjoin" or "restrain" statutory violations, encompasses all the traditional equitable powers of chancery, including the power to order disgorgement of ill-gotten profits.

Porter construed the Emergency Price Control Act of 1942 (EPCA), ch. 26, 56 Stat. 23. EPCA authorized courts to issue orders "enjoining such acts or practices" that "constitute or will constitute a violation of any provision of section 4 of this Act" and to issue orders

---

[4] Those remedies include, but are "not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons." 18 U.S.C. 1964(a).

"enforcing compliance with such provision." 328 U.S. at 397 (quoting EPCA § 205(a), 56 Stat. 33). The Court held that, "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction," including the power to enter a "decree compelling one to disgorge profits." *Id.* at 398. *Mitchell*, which quoted *Porter* at length, similarly held that federal legislation authorizing courts "to restrain violations" of the Fair Labor Standards Act of 1938 (FLSA), ch. 676, § 17, 52 Stat. 1069, granted equitable power to order reimbursement of wages lost because of an unlawful discharge. See 361 U.S. at 290-293.

Porter and *Mitchell* explicitly set out general principles governing the scope of a court's powers when the court acts pursuant to a legislative grant of equitable jurisdiction. In *Porter*, the Court pronounced the general principle that "[u]nless otherwise provided by statute, *all* the inherent equitable powers of the District Court are available for the proper and *complete* exercise" of the grant of equitable jurisdiction. 328 U.S. at 398 (emphasis added). The Court made clear that the "comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command." *Ibid.* Accordingly, "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Ibid.* *Porter* emphasized that when "the public interest is involved," the court's "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Ibid.* Fourteen years later, *Mitchell* reiterated the vitality of *Porter*'s teachings, quoting

Porter's crucial passages as controlling authority. See 361 U.S. at 291.

The court of appeals' decision in this case defies those venerable principles and turns the Court's governing presumption on its head. The majority reasoned that Section 1964(a)'s scope should be restricted because it could not find "any necessary implication" in RICO that Section 1964(a) includes disgorgement. Pet. App. 18a. The majority's ruling cannot be reconciled with *Porter*'s explicit holding that a legislative grant of equitable jurisdiction must be interpreted to include "the full scope" of equitable powers, including disgorgement, "*unless* a statute * * * by a necessary and inescapable inference, restricts" that authority. 328 U.S. at 398 (emphasis added).

2. None of the court of appeals' purported bases for declining to follow *Porter* and *Mitchell* survives analysis. The majority attempted to confine *Porter* to the particular statute that the decision construed by noting that, after the Court announced the controlling principles of construction, it went on to "set forth two theories under which" the restitution order fit within the specific language of EPCA. Pet. App. 15a. This Court's decision in *Mitchell*, however, expressly rejected just such an attempt to limit *Porter*. The Court stated that "[t]he applicability of [*Porter*'s] principle is not to be denied * * * because, having set forth the governing inquiry, [*Porter*] went on to find in the language of the statute affirmative confirmation of the power to order reimbursement." 361 U.S. at 291. *Mitchell* left no doubt that *Porter* stated a rule of general applicability: "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to pro-

vide complete relief in light of the statutory purposes." *Id.* at 291-292.

The majority also stated that *Porter* is distinguishable on the ground that a district court's authority under RICO to "prevent and restrain" violations is uniquely forward-looking in a way that EPCA's grant of jurisdiction to enter an order "enforcing compliance" with the statute was not. Pet. App. 14a-15a. *Mitchell*, however, applied *Porter*'s principle of construction to the FLSA, which, like RICO, authorizes the courts to "restrain violations" of the act, a phrase that the Court equated to "the enforcement of prohibitions contained in [the] enactment." 361 U.S. at 289, 291-292. As Judge Tatel observed in dissent, "[i]f this language opens the door to all equitable relief, then RICO's language—to "prevent and restrain" violations, 18 U.S.C. 1964(a)—certainly does the same." Pet. App. 58a. In *Mitchell*, the Court held that the power to "restrain violations" includes ordering reimbursement of lost wages following a retaliatory discharge that violated the FLSA. It follows that here, the power to "restrain violations" includes the authority to order disgorgement of proceeds obtained from violations of RICO.[5]

---

[5] The court of appeals also erred more generally in characterizing disgorgement as a "quintessentially backward-looking remedy" (Pet. App. 16a). See *id.* at 66a-75a (Tatel, J., dissenting). This Court and the lower courts have repeatedly recognized that disgorgement serves a crucial deterrent function. See, *e.g.*, *Porter*, 328 U.S. at 400 ("Future compliance may be more definitely assured if one is compelled to restore one's illegal gains."); *SEC* v. *First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) ("[d]isgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating" federal law); *FTC* v. *Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996) (same) (quoting *First City Fin.*, 890 F.2d at 1230); *SEC* v. *Manor Nursing Ctrs. Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972) ("The

The court of appeals also inferred a limitation on the relief available under 18 U.S.C. 1964(a) based on the section's specification of certain authorized remedies, including "ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person * * * ; or ordering dissolution or reorganization of any enterprise." Applying the canons of *noscitur a sociis* and *ejusdem generis*, the court believed the relief available under Section 1964(a) to "prevent and restrain" violations must be limited to remedies of a similar character. See Pet. App. 19a. The court was wrong for two reasons.

In the first place, ordering disgorgement of unlawful profits *is* similar to (if not expressly encompassed by) the example of "ordering any person to divest himself of any interest, direct or indirect, in any enterprise." But in addition, the purpose of RICO's remedial provisions was to afford "*enhanced* sanctions and *new* remedies," 84 Stat. 923 (emphasis added). The evident reason for expressly including certain specific remedies in Section 1964(a) was to ensure that it would be read *expansively* to encompass specifically tailored remedial measures that were deemed essential in the particular context of removing the illicit influence and economic base of RICO violators from commerce. See *Turkette*, 452 U.S. at 585, 591-593. Nothing in the statute was intended to preclude traditional equitable relief; indeed,

---

deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits."); *CFTC* v. *Hunt*, 591 F.2d 1211, 1223 (7th Cir. 1979) ("to allow a violator to retain the profits from his violations would frustrate the purposes of the regulatory scheme"); *CFTC* v. *CO Petro Mktg. Group, Inc.*, 680 F.2d 573, 584 (9th Cir. 1982) (same).

the type of "appropriate orders" "permitted under the statute expressly includes, but is "not limited to," those RICO-specific orders. The court of appeals therefore fundamentally erred in inferring from the identification of certain remedies in Section 1964(a) an affirmative intent to *limit* the breadth that the words "prevent and restrain" have under this Court's decisions in *Porter* and *Mitchell*.

The majority's additional contention that the other remedies provided in RICO outside of Section 1964(a) constitute a "'comprehensive and reticulated' remedial scheme" that, by implication, excludes disgorgement from the equitable powers available under Section 1964(a), Pet. App. 19a, 20a, cannot be reconciled with the similar characteristics of EPCA and the FLSA, which provided similarly broad ranges of remedies. EPCA, which was at issue in *Porter*, "authorized a broad array of other remedies, both criminal and civil," including a right for individual suits for treble damages and a provision that the Administrator could sue for the same remedy on behalf of the United States if the individual was not entitled to sue. *Id.* at 52a (Tatel, J., dissenting). As for the FLSA, the Court in *Mitchell* "thought it insignificant that because both the aggrieved employees and the Secretary could seek lost wages in actions at law under FLSA * * * duplicative recovery might occur." *Id.* at 58a (citing 361 U.S. at 303 (Whittaker, J. dissenting)).

The majority was also mistaken in suggesting that disgorgement should be disallowed because the "overlap" between disgorgement and criminal forfeiture would circumvent "the additional procedural safeguards that attend criminal charges." Pet. App. 20a-21a. Congress did not intend RICO's criminal and civil remedies to be mutually exclusive. Rather, Congress

intended that the deliberately "enhanced sanctions and new remedies" in RICO, 84 Stat. 923, would give the government a full range of criminal and civil tools and the ability to choose whichever would be most effective. See S. Rep. No. 617, 91st Cong., 1st Sess. 80 (1969) (observing that criminal prosecution is "a relatively ineffectual tool" for implementing RICO's "economic policy"). Indeed, Congress recognized the potential "overlap" between RICO's criminal and civil remedies, noting that a criminal influence "can be legally separated from the organization, either by the criminal law approach * * * or through a civil law approach of equitable relief." *Id.* at 79.

In finding a statutory overlap, the majority also incorrectly equated equitable disgorgement with the provisions for criminal forfeiture and private damages. In contrast to the mandatory sanction of criminal forfeiture, an award of disgorgement under Section 1964(a) is subject to the court's sound discretion and must make "due provision for the rights of innocent persons." See Pet. App. 72a-73a. And, unlike a private damages award under Section 1964(c), disgorgement is not trebled or keyed to a victim's loss, but is directly tied to the wrongdoer's profits.

3. The court of appeals placed erroneous reliance on *Meghrig* v. *KFC Western, Inc.*, 516 U.S. 479 (1996), for the view that "it cannot be assumed that Congress intended to authorize by implication additional judicial remedies," such as disgorgement under Section 1964(a), in light of the "elaborate enforcement proceedings" set forth in RICO. Pet. App. 18a. *Mehgrig* arose in the wholly different context of a private action seeking compensation for past clean-up costs through a citizen suit under the Resource Conservation and Recovery

Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.* 516 U.S. at 484.

This Court has long recognized that the citizen suit provisions of environmental statutes, which require advance notice to the alleged violator and are barred if the government is taking enforcement action, are "meant to supplement rather than to supplant governmental action," and are specifically addressed to ongoing violations of the statute. *Gwaltney of Smithfield Ltd.* v. *Chesapeake Bay Found.*, 484 U.S. 49, 60 (1987). *Meghrig* also turned on the irrationality of RCRA's scheme if citizen clean-up actions were permitted, 516 U.S. at 486, and on Congress's *express* provision, in a companion environmental statute, of a mechanism for private recovery of past clean-up costs, *id.* at 484-485. Against that background, it is not surprising that the Court said that "it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under the statute." *Id.* at 488 (internal quotation marks omitted).

This case, in contrast, involves a governmental action for equitable relief, where the "public interest" justifies a "broader and more flexible" application of "equitable powers" than in a mere "private controversy." *Porter*, 328 U.S. at 398. The applicable canon in the present context is drawn from *Porter*: a clear and unmistakable inference is required to curtail the court's equitable jurisdiction. No such inference can be drawn here. Thus, as Judge Tatel correctly recognized, "*Porter* and *Mitchell*, not *Meghrig*, 'directly control' this case." Pet. App. 62a.

B. The Court Of Appeals' Decision Creates A Direct Conflict With Decisions Of Other Courts Of Appeals

The court of appeals' decision not only conflicts with the principles that this Court set out in *Porter* and *Mitchell*, but also creates a direct conflict with the Second Circuit's decision in *United States* v. *Carson*, 52 F.3d 1173 (1995), and the Fifth Circuit's decision in *Richard* v. *Hoechst Celanese Chem. Group, Inc.*, 355 F.3d 345 (2003). As the court of appeals in this case itself acknowledged (Pet. App. 21a-22a), its decision stands in irreconcilable conflict with those decisions and isolates the D.C. Circuit as the only court of appeals to reject disgorgement under RICO regardless of the facts.

Carson and *Richard* each hold, in accordance with this Court's decisions in *Porter* and *Mitchell*, that Section 1964(a) authorizes equitable disgorgement as an available RICO remedy in appropriate circumstances. It is true that those decisions impose fact-based limitations on a district court's use of that remedy. *Carson* states that disgorgement is limited to assets that are "being used to fund or promote the illegal conduct, or [that] constitute capital available for that purpose," 52 F.3d at 1182, while *Richard* states that disgorgement is available only to prevent ongoing and future RICO violations, 355 F.3d at 354-355. The dissent rightly concluded that this Court's decisions do not sanction those limitations. See Pet. App. 51a-65a. But regardless of those limitations, the Second and Fifth Circuit decisions cannot be reconciled with the panel majority's ruling in this case that Section 1964(a) precludes the government, as a matter of law, from obtaining equitable disgorgement in a civil RICO action under *any* circumstances. See *Richard*, 355 F.3d at 354 ("disgorgement

is generally available under § 1964"); *Carson*, 52 F.3d at 1181 ("As a general rule, disgorgement is among the equitable powers available to the district court by virtue of 18 U.S.C. § 1964.").[6]

---

[6] The panel majority's decision is also inconsistent with numerous decisions of other courts of appeals applying the principles of *Porter* and *Mitchell* to other statutory schemes. As Judge Tatel explained (Pet. App. 58a-59a), those courts have repeatedly held that grants of equitable authority similar to the grant in RICO do not restrict a district court's inherent power to order disgorgement or restitution. See, *e.g.*, *FTC* v. *Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996) (authorization "to enjoin" violations of the Federal Trade Commission Act encompasses the power to order disgorgement); *United States* v. *Universal Mgmt. Servs.*, 191 F.3d 750, 760 (6th Cir. 1999) (grant of jurisdiction in Section 332(a) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 332(a)) "to restrain" violations authorizes district courts to compel disgorgement and restitution), cert. denied, 530 U.S. 1274 (2000); *SEC* v. *First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) (provisions of the Securities Exchange Act, 15 U.S.C. 78u(d)-(e), authorizing the district court "to enjoin" future violations allow disgorgement); *ICC* v. *B & T Transp. Co.*, 613 F.2d 1182, 1183, 1184-1185 (1st Cir. 1980) (provision of Motor Carrier Act of 1980 empowering ICC "to seek only prospective injunctions to restrain future conduct" encompassed authority to seek restitution); *CFTC* v. *Hunt*, 591 F.2d 1211, 1223 (7th Cir. 1979) (in the absence of an express restriction, the Commodity Exchange Act authorizes an order compelling disgorgement of illegally obtained profits); *CFTC* v. *British Am. Commodity Options Corp.*, 788 F.2d 92, 94 (2d Cir.) (following *Hunt*), cert. denied, 479 U.S. 853 (1986); *CFTC* v. *American Metals Exch. Corp.*, 991 F.2d 71, 76 & n.9 (3d Cir. 1993) (same); *CFTC* v. *CO Petro Mktg. Group, Inc.*, 680 F.2d 573, 583-584 (9th Cir. 1982) (same).

II. THE COURT OF APPEALS' DECISION INCORRECTLY RESOLVES AN IMPORTANT ISSUE IN A CRITICALLY IMPORTANT CASE

In formulating RICO, Congress gave the federal government essential resources for combating the use of an unlawful enterprise to violate federal fraud proscriptions for financial gain. RICO's civil remedy provisions, which are to "be liberally construed to effectuate [RICO's] remedial purposes," Pub. L. No. 91-452, § 904(a), 84 Stat. 947, provide the curative instruments for eradicating the wrongful conduct. The court of appeals has disabled the government from employing a critically important remedial tool—equitable disgorgement—for achieving Congress's objectives. That court has done so in a case of vital interest to the American public.

As this Court has explained, Congress sought to curtail the "revenue and power" that RICO violators derive from past illegal conduct, and it therefore provided remedies that would allow "an attack * * * on *their source of economic power itself.*" *Turkette*, 452 U.S. at 591-592 (quoting, with emphasis, S. Rep. No. 617, 91st Cong., 1st Sess. 79 (1969)). Section 1964(a) accordingly grants courts authority to craft "equitable relief broad enough to do all that is necessary" to address "the economic base" of RICO violators and to "free the channels of commerce from all illicit activity." S. Rep. No. 617, *supra*, at 79. "Although certain remedies are set out, the list is not exhaustive." *Id.* at 160.

This Court's decision in *Turkette* envisioned that the government would seek equitable disgorgement, as one of RICO's various remedies, in order to rectify past RICO violations and deter future misconduct. 452 U.S.

at 585. The court of appeals, however, brushed aside the Court's express recognition that Section 1964 empowers the courts "to *divest the association of the fruits of its ill-gotten gains*," *ibid.* (emphasis added), and held that disgorgement is categorically unavailable precisely *because* it is "aimed at separating the criminal from his prior ill-gotten gains." Pet. App. 19a. That holding frustrates one of the chief aims of RICO's civil remedies —deterring future RICO violations by depriving the RICO enterprise of the economic benefits of its unlawful conduct. Accomplishing that purpose is especially important in the context of this case, because the addictive nature of the products that are the subject of respondents' extensive pattern of fraud has ensured that their conduct will have a lasting effect in its impact on victims and in generating profits for respondents that continue to this day and beyond.

The court of appeals' decision has potentially far-reaching implications for RICO cases generally and enormous consequences for the American public. The decision already has had consequences for the ongoing litigation in this important civil RICO action. The government alleges that respondents—which include the Nation's major tobacco companies—formed an enterprise to convince millions of past, present, and future smokers, through numerous documented instances of mail and wire fraud over a period of decades, that cigarettes—including "light" and "low-tar" varieties—are safe and non-addictive and that second-hand smoke does not pose a significant health risk. The government has put forward extraordinarily extensive evidence in the nine-month trial that respondents have violated RICO. Notwithstanding the government's compelling showing of liability, the court of appeals' decision will

severely constrain the remedies available to the government.[7]

In the wake of the court of appeals' decision, respondents have argued that the ruling broadly "prohibits remedies that 'cure ill effects of past unlawful conduct,'" including: (a) a "smoking cessation program * * * aimed at ameliorating * * * the addiction of smokers * * * deceived by fraudulent conduct"; (b) "monitoring [of] smokers for the onset of smoking-related diseases"; or (c) a "public education campaign and * * * youth smoking prevention campaign" that would "protect the public from being negatively impacted by [respondents'] violations." Defendants' Memo. Regarding Non-Disgorgement Remedies 3, 9, 10, 11 (Feb. 23, 2005). The district court has not definitively decided the scope of permissible relief, but it has stated that the court of appeals' ruling "simply does not permit non-disgorgement remedies to prevent and restrain the effects of past violations of RICO." Order #886, at 5 (Feb. 28, 2005). The government has correspondingly curtailed its proposed remedies to accord with the divided court of appeals' ruling.[8]

---

[7] The government's evidence in support of RICO liability and remedies has included testimony from 178 witnesses and more than 11,000 offered or admitted trial exhibits. The government has described its evidence in its opening statement, Trial Tr. 8-197, in interim summations, *id.* at 6398-6455, 14,214-14,296, 19,676-19,758, and in closing arguments, *id.* at 22,894-23,102.

[8] The government developed evidence in discovery supporting a disgorgement remedy that could have required respondents to relinquish $280 billion in ill-gotten gains. But at trial, in light of the court of appeals' decision, the government has requested from the trial court more limited remedies that, if imposed, would require respondents to pay at least $10 billion over five years for a smoking cessation program and $4 billion over ten years for public

This case graphically illustrates the practical consequences of the court of appeals' decision. Under that decision, the government faces the prospects that it cannot effectively compel RICO violators to address the consequences of their statutory violations and that those violators may retain the profits of their unlawful activity no matter how destructive the consequences for the American public as a whole. Congress did not intend that result, which in this case could prevent the government from formulating effective equitable remedies and obtaining disgorgement of many billions of dollars of proceeds that respondents obtained through the violation of federal law.

III. THE INTERLOCUTORY CHARACTER OF THE COURT OF APPEALS' DECISION IN THIS INSTANCE WEIGHS IN FAVOR OF THIS COURT'S REVIEW

The United States has pointed out in numerous instances that the interlocutory character of a court of appeals' decision normally counsels against this Court's immediate review because the proceeding in the lower court may obviate the need for the Court's intervention. See, *e.g.*, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967). But the Court has recognized that "there is no absolute bar to review of nonfinal judgments of the lower federal courts" and that the interlocutory character of a decision affects only the prudential calculus of whether certiorari should be granted. See, *e.g.*, *Mazurek* v. *Armstrong*, 520 U.S. 968, 975 (1997) (per curiam) (summarily reversing an interlocutory order). When "there is some important and clear-cut issue of

---

education and counter marketing. See [Proposed] Final Judgment and Order (June 27, 2005).

law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." Robert L. Stern et al., *Supreme Court Practice* 259 (8th ed. 2002). The Court has not hesitated to review an interlocutory decision when "it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co.* v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893). Indeed, this Court has granted review of interlocutory court of appeals decisions, decided pursuant to 28 U.S.C. 1292(b), innumerable times.[9]

This case presents an instance in which the prudential considerations weigh heavily in favor of immediate review. The issue presented here—whether Section 1964(a) authorizes a court to grant the government the remedy of equitable disgorgement in a RICO action—plainly warrants this Court's review for the reasons already stated: (1) the divided court of appeals' resolution of that issue is inconsistent with the decisions of this Court and other courts of appeals (pp. 9-19, *supra*); and (2) and the issue presents a vitally important and recurring question that has major consequences for this important case (pp. 20-23, *supra*). The interlocutory character of the court of appeals' ruling on that issue should not preclude this Court's

---

[9] For a few recent examples, see, *e.g.*, *Cutter* v. *Wilkinson*, 125 S. Ct. 2113 (2005); *Norfolk S. Ry.* v. *Kirby*, 125 S. Ct. 385 (2004); *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004); *Gratz* v. *Bollinger*, 539 U.S. 244 (2003); *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1 (2003); *Breuer* v. *Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003); *Bartnicki* v. *Vopper*, 532 U.S. 514 (2001); *Green Tree Fin. Corp.-Ala.* v. *Randolph*, 531 U.S. 79 (2000); *Harris Trust & Sav. Bank* v. *Salomon Smith Barney Inc.*, 530 U.S. 238 (2000).

review where the interlocutory review process has produced an erroneous intermediate appellate court ruling that, if left undisturbed, would require the district court to fashion a remedy based on fundamentally mistaken principles of law.

The district court determined five years ago that Section 1964(a) allows equitable disgorgement, Pet. App. 117a-121a, and it certified its May 24, 2004, order, despite the government's objection, for the limited purpose of obtaining guidance on whether the so-called "*Carson* standard" for disgorgement applies to this case. See *id.* at 148a-153a. Over a forceful dissent, the court of appeals panel majority elected to go beyond the narrow issue that prompted the district court to certify its order. See *id.* at 37a-49a, (Tatel, J., dissenting); see note 1, *supra*. Indulging respondents' "questionable tactics" (*id.* at 48a), the divided court reached out to decide an issue unnecessarily and contrary to the decisions of this Court, other courts of appeals, and the court of appeals' own precedent. See pp. 9-19, *supra*.

That unwarranted and badly mistaken decision—which the en banc court left unreviewed following a tie vote on whether to grant rehearing—will impair, rather than advance, the ultimate resolution of this case. The district court certified its order for interlocutory review to address the applicability of the *Carson* standard, which that court discerned to provide a "substantial ground for difference of opinion." See Pet. App. 151a (emphasis omitted). The court of appeals majority instead reached out to address an issue—the availability of disgorgement—over which the district court and the courts of appeals were heretofore in *agreement*. If the Court postpones correction of the court of appeals' mistaken guidance until after the district court issues an artificially constrained final judgment and this

complex case traces a new route through the court of appeals, then the district court will be precluded from *correctly* resolving this litigation until remand proceedings can be convened at a far distant date.[10]

The district court has not yet rendered a ruling on liability in this case, but respondents have no basis for expecting a favorable outcome. The government has put forward a powerful liability case, see note 7, *supra*, and the district court has provided no indication that the government has failed to carry its burden of proof. In any event, this Court has repeatedly granted review of interlocutory court of appeals decisions in similar circumstances involving issues of far less significance. For example, the Court recently reviewed an interlocutory court of appeals decision addressing remedial issues in advance of a liability determination in *Norfolk Southern Railway* v. *Kirby*, 125 S. Ct. 385 (2004). That

---

[10] Under the current schedule, post-trial briefing will not be completed until October 2005. See Order #964-A (June 10, 2005). The district court could conceivably issue a final decision by early 2006, but even if the court of appeals undertook expedited review, the briefing in the court of appeals would likely not be completed until the summer of 2006. Given the massive record in this case, the court of appeals would be unlikely to issue a decision until 2007. Under the best of circumstances, this Court would not receive a petition for writ of certiorari before the summer of 2007. If the Court granted the petition, it could not reasonably be expected to issue a decision until 2008. Under this optimistic projection, remand proceedings would be unlikely to commence until late 2008 at the earliest. In light of the daunting burden the district court would face in recommencing proceedings three or more years from now in this complex six-year-old case, the Court should resolve the correctness of the court of appeals' interlocutory guidance during its 2005 Term so that the district court can issue a final decision—relying on this Court's definitive guidance—by the summer of 2006.

case, which involved narrow issues of maritime liability affecting a limited number of carriers, involved matters of far less pressing public importance than the issue involved here. Nevertheless, the Court granted review to decide—before the district court had determined petitioner's liability in the maritime contract dispute—whether petitioner was entitled to the protection of potential contractual liability limitations. See *id.* at 392.[11]

In short, this case warrants the Court's attention at this critical juncture of the litigation. The court of appeals' mistaken interlocutory guidance not only presents an obstacle, rather than an aid, to the ultimate termination of the litigation, but it stands as a mistaken precedent that will continue to misdirect other courts and constrain the government's ability to seek full relief in future civil RICO cases. As the court of appeals

---

[11] The Court followed the same practice in *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199 (1996), granting review to determine, in advance of a liability determination, whether certain state law remedies remain available to a personal injury claimant in a maritime wrongful-death suit. See *id.* at 204. The Court also followed that practice in *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122 (1989), granting review, in advance of a liability determination, to determine whether the Warsaw Convention's limitation on damages for passenger death applies despite the defendant's failure to provide adequate notice of the limitation. See *id.* at 124. Similarly, the Court decided a case concerning the availability of an innocent-owner defense in a civil forfeiture action where the claimant, on remand, could also defeat forfeiture by rebutting the finding of probable cause. *United States* v. *92 Buena Vista Ave.*, 507 U.S. 111 (1993). Each of these cases reached the Court after the respective court of appeals rendered a decision through the interlocutory procedure set out in 28 U.S.C. 1292(b). See *Kirby*, 125 S. Ct. at 392; *Yamaha*, 516 U.S. at 204-205; *Chan*, 490 U.S. at 124-125; *92 Buena Vista Ave.*, 507 U.S. at 116.

panel itself acknowledged, its decision has created a circuit conflict, and the court of appeals' inability to decide the issue en banc ensures that the conflict will persist until this Court resolves it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

EDWIN S. KNEEDLER
Acting Solicitor General[*]
PETER D. KEISLER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
JEFFREY P. MINEAR
Assistant to the Solicitor General
SHARON Y. EUBANKS
STEPHEN D. BRODY
FRANK J. MARINE
MARK B. STERN
ALISA B. KLEIN
MARK R. FREEMAN
Attorneys

JULY 2005

---

[*] The Solicitor General is disqualified in this case.

Supreme Court, U.S.
FILED
05-92 JUL 18 2005
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP MORRIS USA, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

EDWIN S. KNEEDLER
Acting Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
JEFFREY P. MINEAR
Assistant to the Solicitor General
SHARON Y. EUBANKS
STEPHEN D. BRODY
FRANK J. MARINE
MARK B. STERN
ALISA B. KLEIN
MARK R. FREEMAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

	Page
Appendix A (court of appeals opinion, dated Feb. 4, 2005)	1a
Appendix B (district court memorandum opinion, dated Sept. 28, 2000)	79a
Appendix C (district court memorandum opinion, dated May 21, 2004)	129a
Appendix D (district court memorandum order #579, dated June 25, 2004)	148a
Appendix E (district court order, dated July 15, 2004)	154a
Appendix F (district order, dated Apr. 19, 2005)	156a
Appendix G (statutory provision)	158a

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 04-5252

UNITED STATES OF AMERICA, APPELLEE

v.

PHILIP MORRIS USA INC., ET AL., F/K/A PHILIP MORRIS INCORPORATED, APPELLANTS

Feb. 4, 2005

OPINION

Before: SENTELLE and TATEL, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge SENTELLE.

Concurring opinion filed by Senior Circuit Judge WILLIAMS.

Dissenting opinion filed by Circuit Judge TATEL.

SENTELLE, Circuit Judge.

A group of cigarette manufacturers and related entities ("Appellants") appeal from a decision of the District Court denying summary judgment as to the Government's claim for disgorgement under the Racketeer Influenced and Corrupt Organizations Act ("RICO" or "the Act"), 18 U.S.C. §§ 1961-68. The relevant section

of RICO, 18 U.S.C. § 1964(a), provides the District Courts jurisdiction only for forward-looking remedies that prevent and restrain violations of the Act. Because disgorgement, a remedy aimed at past violations, does not so prevent or restrain, we reverse the decision below and grant partial summary judgment for the Appellants.

I. Background

In 1999 the United States brought this claim against appellant cigarette manufacturers and research organizations, claiming that they engaged in a fraudulent pattern of covering up the dangers of tobacco use and marketing to minors. The Government sought damages under the Medical Care Recovery Act ("MCRA"), 42 U.S.C. §§ 2651-53, and the Medicare Secondary Payer ("MSP") provisions of the Social Security Act, 42 U.S.C. § 1395y to recover health-care related costs Appellants allegedly caused. The United States also claimed that Appellants engaged in a criminal enterprise to effect this cover-up, and sought equitable relief under RICO, including injunctive relief and disgorgement of proceeds from Appellants' allegedly unlawful activities. The Government sought this relief under 18 U.S.C. § 1964(a), which gives the District Court jurisdiction

> to prevent and restrain violations of [RICO] by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign

> commerce; or ordering dissolution or reorganization of any enterprise. . . .

18 U.S.C. § 1964(a).

Appellants moved to dismiss the complaint in 2000. The District Court did dismiss the MCRA and MSP claims, but allowed the RICO claim to stand. *United States v. Philip Morris, Inc.*, 116 F. Supp. 2d 131, 134 (D.D.C. 2000).

Section 1964(a) conferred jurisdiction on the District Court only to enter orders "to prevent and restrain violations of the statute." In considering whether disorgement came within this jurisdictional grant, the court relied on a decision of the Second Circuit, the only circuit then to have considered "whether . . . disgorgements . . . are designed to 'prevent and restrain' *future* conduct rather than to punish *past* conduct." *United States v. Carson*, 52 F.3d 1173, 1182 (2d Cir. 1995) (emphasis in original). After noting that "RICO has a broad purpose [and] the legislative history of § 1964 indicates that the equitable relief available under RICO is intended to be 'broad enough to do all that is necessary," *id.* at 1181, the *Carson* court went on to observe that it did not see how it could "serve[ ] any civil RICO purpose to order disgorgement of gains illgotten long ago. . . ." *Id.* at 1882. The portion of *Carson* relied upon by the District Court in the present controversy suggested that disgorgement *might* "serve the goal of 'preventing and restraining' future violations," but flatly held that the remedy would not do so "unless there is a finding that the gains are being used to fund or promote the illegal conduct, or constitute

capital available for that purpose."[1] *Id.* at 1182. The Second Circuit went on to caution that disgorgement would be better justified under this analysis where the "gains [were] ill-gotten relatively recently." *Id.* The District Court accepted the Second Circuit's suggested holding that the appropriateness of disgorgement depends on whether the proceeds are available for the continuing of the criminal enterprise, but ruled that the question was premature, and denied the motion for dismissal on the RICO-disgorgement claim. *Philip Morris*, 116 F. Supp. 2d at 151-52. Neither party sought leave to file an interlocutory appeal of that ruling.

The case proceeded, and the Government sought disgorgement of $280 billion that it traced to proceeds from Appellants' cigarette sales to the "youth addicted population" between 1971 and 2001. This population includes all smokers who became addicted before the age of 21, as measured by those who were smoking at least 5 cigarettes a day at that age.

---

[1] While the *Carson* language may appear to be dicta, the Second Circuit remanded for determination of which disgorgement amounts were sufficiently directed to prevention and restraint to qualify under § 1964(a), thus treating the language on availability of disgorgement as essential to the outcome of the case, and therefore a holding. Some other courts have followed *Carson*. *See, e.g., Richard v. Hoechst Celanese Chem. Group, Inc.*, 355 F.3d 345, 354 (5th Cir. 2003) (observing that "the Second Circuit noted that disgorgement is generally available under § 1964"); *United States v. Private Sanitation Indus. Ass'n*, 914 F. Supp. 895, 901 (E.D.N.Y. 1996) ("[T]he disgorgement in this case is clearly directed towards the prevention of future illegal conduct, and is therefore a permissible remedy for civil RICO violations under the limitations imposed by Carson.").

After discovery, Appellants moved for summary judgment on the disgorgement claim arguing that (1) disgorgement is not an available remedy under § 1964(a), (2) even if disgorgement were available, the Government's model fails the *Carson* test for permissible disgorgement that will "prevent and restrain" future violations, and (3) even if disgorgement were available, the Government's proposed model is impermissible because it includes both legally and illegally obtained profits in violation of *SEC v. First City Financial Corp.*, 890 F.2d 1215 (D.C. Cir. 1989). The District Court denied this motion in a memorandum order designated "#550." *United States v. Philip Morris USA, Inc.*, 321 F. Supp. 2d 72 (D.D.C. 2004). On motion of the defendants, the District Court certified Order #550 for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). That section provides for interlocutory appeal where a district judge has certified that "an order not otherwise appealable . . . involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of litigation. . . ." Under § 1292(b), the Court of Appeals may then decide whether to permit the appeal to be taken from such order. In the present case, we allowed the appeal.

II. Analysis

A. Scope of Review

At the outset, the Government urges that our review should be limited to the narrow question of whether the disgorgement it seeks is consistent with the standards of *Carson*, not whether disgorgement *vel non* is an available remedy under civil RICO. The Government bases this argument on the theory that the order on

appeal—that is the memorandum order denying "defendants' motion for partial summary judgment dismissing the Government's disgorgement claim"—was reiterating a prior order on the general question of availability of disgorgement. Further, the Government argues, the order spoke anew only to the measure of disgorgement, assuming such disgorgement to be otherwise available. In support of its proposed limitation of our review, the Government relies upon *Yamaha Motor Corp., USA v. Calhoun*, 516 U.S. 199, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996). In *Yamaha*, the Supreme Court dealt with the breadth of review properly conducted by a court of appeals under 28 U.S.C. § 1292(b). *Id.* at 204, 116 S. Ct. 619. The Government selectively quotes from *Yamaha* the sentence that, "The court of appeals may not reach beyond the certified order to address others made in the case." *Id.* at 205, 116 S. Ct. 619. Based on this sentence, the Government then argues that because the first order denying a motion to dismiss had dealt with the question of the availability of disgorgement, this certified interlocutory review of the subsequent summary judgment order is restricted to the new theory considered by the court on that occasion-that the disgorgement the Government pursued exceeded the standard available for such disgorgement as set by the Second Circuit in *Carson*.

Unfortunately for the Government's position, the *Yamaha* opinion did not end with the sentence upon which the Government relies. The Supreme Court went on to say in the same paragraph: "But the appellate court may address any issue fairly included within the certified order because 'it is the *order* that is appealable, and not the controlling question identified by

the district court.'" *Id.* (emphasis in original) (quoting 9 J. MOORE & B. WARD, MOORE'S FEDERAL PRACTICE § 110.25[1] at 300 (2d ed. 1995) and citing 16 C. Wright, A. Miller, E. Cooper, & E. Greshman, Federal Practice & Procedure § 3929 at 144-45 (1977)). Appellants' motion below was for "Summary Judgment Dismissing the Government's Disgorgement Claim," and granting this motion would have resulted in *complete dismissal* of the Government's claim for disgorgement with prejudice. *See* Appellee's App. at 19, 79. Thus the District Court's denial was on the question of whether disgorgement would be allowed *at all*, and we may review it as such regardless of the grounds the District Court gave for its decision. In the memorandum accompanying its denial of this motion, evidencing an accurate understanding of the summary judgment standard provided by Rule 56 of the Federal Rules of Civil Procedure, the District Court noted that "summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Philip Morris*, 321 F. Supp. 2d at 74 (citing FED. R. CIV. P. 56(c)). Significantly, the court further noted that "Defendants argue that any disgorgement which might be ordered upon a finding of liability must be limited by *both the text of Section 1964(a) itself and the holding* in United States v. Carson . . . interpreting that section." *Philip Morris*, 321 F. Supp. 2d at 74 (emphasis added). Thus the court clearly implied the possibility that none might be ordered, and that statutory issues outside *Carson* were before the court.

Our dissenting colleague argues that the availability of the disgorgement claim *vel non* is not before us because Appellants did not fully restate their earlier arguments in their motion, but only expressed their reservation in a footnote referencing the District Court's prior rejection of their position. While it is true, as our colleague reminds us, that we have held that a "litigant does not properly raise an issue by addressing it in a 'cursory fashion,' with only 'bare-bones arguments,'" *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 869 (D.C.Cir. 2001) (per curiam), our prior holdings on that subject have been in very different contexts. In *Cement Kiln*, for example, and in *Wash. Legal Clinic for the Homeless v. Barry*, 107 F.3d 32, 39 (D.C. Cir. 1997), relied upon by the dissent, we were determining whether an issue was properly before us that had been raised in no other fashion. In the present case, we are reviewing a summary judgment decision, presumably according to the standards set forth by the Supreme Court in such decisions as *Yamaha*, and the issue in question was clearly decided by the District Court in the first rejection of the motion to dismiss. The issue was called to the attention of the second summary judgment order, now under direct review, and expressly pointed out in the footnote which our colleague disdains. Furthermore, the motion leading to the order presently before us sought summary judgment of dismissal of the disgorgement claim, not simply a limitation to such disgorgement as might have been supported by the *Carson* test or other factors. Given the Supreme Court's plain teaching in *Yamaha*, particularly its adoption from a learned treatise of the language "it is the order that is appealable, and not the controlling question identified by the district court," *Yamaha*, 516 U.S. at 205, 116 S. Ct. 619 (*see* other

authorities, *supra*), *Cement Kiln* and *Barry* have no applicability. *Yamaha* controls. We therefore proceed to review the denial of summary judgment, under the usually applicable standards, not simply the sole question to which the Appellees and the dissent would restrict us.

Our dissenting colleague suggests that we are limited by "our general policy of declining to consider arguments not made to the district court in the motion leading to the order under appeal." Dissent at 1211. We know of no such "general policy" that the particular issue addressed has to have been raised in the particular motion. Rather, we understand our general policy to be following the instructions of the Supreme Court that we are to "address any issue fairly included within the certified order." *Yamaha*, 516 U.S. at 205, 116 S. Ct. 619. Insofar as our colleague's differing understanding rests on *United States v. British Am. Tobacco (Invs.) Ltd.*, 387 F.3d 884, 892 (D.C. Cir. 2004) (citing *United States v. Hylton*, 294 F.3d 130, 135-36 (D.C. Cir. 2002)), cited by Dissent at 1213, we do not read that case as supporting a general policy that limits consideration to those arguments raised in the particular motion leading to the certified order, as opposed to being "fairly included" within that order, or even to address the point. The court in *British American Tobacco* held only that an intervenor that had raised a privilege issue with respect to an entire collection of documents at one stage of the litigation, but that failed to participate at all in later proceedings focused on one of the documents, despite having notice, had not adequately preserved its objection as to that single document. 387 F.3d at 887-88. It had nothing to do with the scope of review on an interlocutory appeal under

§ 1292(b). Neither it nor *Hylton* dealt in any fashion with the breadth of interlocutory review, nor was establishing any standard for the papers in which an argument must have been raised. Each rejected an attempt by an appellant to raise a new ground for the first time on appeal. Appellants before us raised and preserved their argument as set forth in the text above. We read nothing in *British American Tobacco* or *Hylton* to suggest a general policy barring our review under the *Yamaha* standard.

We find no history of such a general policy that would bar us from considering questions logically antecedent and essential to the order under review. Especially is this so given the Supreme Court's instructions in *Yamaha* that we are to "address any issue fairly included within the certified order." That must include at least issues that are logically interwoven with the explicitly identified issue and which were properly presented by the appellant. Even ignoring the apparent allusion to the broader issue of summary judgment preserved in the caption of the motion, the relief sought, and the footnote provided above, it is difficult to see how we could establish such a policy that would cause us to affirm a decision denying summary judgment when a ground compelling its grant is fairly encompassed within the order. Our colleague's interpretation of general policy would seem to compel us to return for trial a case before us for review of a denial of summary judgment, no matter how plain the absence of substantial question of material fact, on the grounds that the denial of summary judgment had been based on rejection of some other reasoning in a previous motion, even though the trial court had earlier erred in denying the first motion to dismiss—even when the appellant